IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 115 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ALI MOHMAD SIDDIQUE BALOCH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS PAURAMI B SHETH for Appellant(s) : 1,
MS PANDIT ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 17/07/2007

ORAL JUDGMENT

Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Vadodara in Sessions Case No.106 of 1987 on 24th January, 1992,

the present appellant-original accused No.2 has preferred the present appeal under the provisions of Section 374 of the Code of Criminal Procedure. The present appellant has been convicted for the offence punishable under Section 307 of the Indian Penal Code and sentenced to undergo four years rigorous imprisonment and to pay a fine of Rs.1,000/- and in default of making payment of fine to undergo two months imprisonment. Whereas, the original accused No.1 has been acquitted from the charges levelled against him.

2. The judgment and order of conviction and sentence has been challenged by raising various grounds mentioned in paragraph 3 of the memo of appeal. Ms.Paurami Sheth, learned Counsel for the appellant has taken this Court through the main grounds of challenge so also through the oral as well as documentary evidence led by the prosecution during the course of trial. According to learned Counsel for the appellant, the finding recorded by the learned trial Judge is erroneous because the same is based on incorrect appreciation of evidence. It also

suffers from certain legal infirmities as well as errors and therefore the order of conviction should be held unsustainable and the appellant-original accused No.2 should be acquitted from the charges levelled against him. She has further submitted that two persons were prosecuted and charged by the Investigating Agency with practically similar allegations. However, the learned trial Judge has decided to acquit the original accused No.1 for no good reasons and the present appellant has been linked with the crime mainly on conjectures and surmises. To bring home the charge the prosecution ought to have proved its case by leading cogent and convincing evidence. Certain important witnesses have not been examined and one finding though is against the prosecution in reference of gun used in the commission of offence, the appellant has been held guilty of the charge of using the very gun in commission of offence and he has been asked to serve the rigorous imprisonment as stated aforesaid.

3. Ms.Pandit, learned Addl. Public Prosecutor, for the respondent-State has submitted that impugned

judgment and order is based on sound reasons and two witnesses who have deposed before the Court, have been rightly believed by the learned trial Judge. There was no reason for the trial Judge to discard the evidence of injured witness-Shantilal Ambalal, as such there was no serious dispute as to the nature of injury that was found on the body of injured person also as to the place of offence. There is ample evidence on record to show that the accused persons were known to this injured witness and incident had occurred in broad-day-light i.e., between 5:15 and 5:30 p.m. in the month of September. The Prosecution Witness No.4, Ravjibhai Haribhai Patel, who has been examined at Exh.13 of course has been branded as interested witness but the learned trial Judge has taken ample caution by scanning the evidence before accepting his version as reliable piece of evidence. Prosecution Witness No.4-Ravji was having his agriculture land near the bus-stop of village Masargam of Tal. Padra and he was returning from his agricultural field and going towards his home and he was at a distance of about 4 feet from the injured person, therefore the learned trial Judge cannot be

said to have committed any error in accepting his version. The gun seized during the course of investigation was sent for analysis and the same was found used. The Police had collected some articles from the spot including the earth and the result of analysis carried out by the F.S.L., reveals that the incident had occurred in the 'sim' of village Masargam. According to learned A.P.P., when the injured started to his village, both the accused persons had assaulted him and the present appellant has been held responsible for causing gun shot injury by using double barrel gun. There is also evidence on record to show that both the accused persons were inimical to injured and a litigation was pending before the Court of learned Judicial Magistrate First Class, Padra between the original accused No.1 and injured-Shantilal, as well as, the present appellant and injured-Shantilal. Learned A.P.P., has further submitted that merely because the trial Court has acquitted the original accused No.1 and State has not preferred any acquittal appeal, the present appellant cannot get the advantage of that error, even if the original accused No.1 is convicted by the learned

trial Judge. This is a case where formal examination of ballistic expert was not required. The report of the F.S.L. and ballistic was received through the Investigating Officer and the learned trial Judge has rightly considered these documents. Though the Panch Witnesses have not supported the case of prosecution and discovery Panchnama of gun has not been believed or considered by the learned trial Judge, it would not effect the ultimate finding of guilt recorded by the learned trial Judge. She has further submitted that the conviction recorded by the learned Judge is on sound reasons and therefore the appeal deserves to be rejected.

4. To appreciate the rival side contentions, it would be beneficiary to state the basic facts that were placed by prosecution initially when both the accused persons were charge-sheeted because while framing the charge, the present appellant-accused was not charged for the offence punishable under Section 25 (1C) of the Arms Act. It is neither the case of prosecution nor any documentary evidence is led to prove that the accused was holding any fire arm

unauthorizedly allegedly used in the commission of offence. The appellant-accused was possessing or owning a fire arm under a valid licence because it is referred in the evidence that the present appellant was serving as Guard “Sim Rakha” for the whole village-Masargam. It is the practice of practically all happy and wealthy village to employ a guard who would protect the agricultural fields and properties of the farmers of the village. It is in evidence that the present appellant was serving as “Sim Rakha” in village Masargam and was also provided him a residential premises in the outskirts of the said village in the year 1983-84. It is the say of prosecution that son of the appellant had fled away with one village girl, daughter of one Ishwar Ganesh Rohit and therefore the Village Panchayat has resolved to terminate the services of the appellant. So, if the appellant was actually holding fire arm related to his nature of employment then it was very easy for prosecution to prove that gun seized during the course of investigation, is the gun owned or possessed by the appellant-original accused No.2. Two eye-witnesses were examined including the

injured, have not clearly stated that the muddamal gun shown to them during the examination in the Court, is a very gun that they had seen in the hands of accused No.2-appellant herein at relevant point of time. In this background, the Court is inclined to state the basic facts that were placed initially before the Police by the complainant.

4.1. According to the prosecution case, the present appellant, in the year 1983-84 was working as 'Simrakha' and to look after the fields of Masar Village. While he was staying at Masar Village, his son came in contact with daughter of one Ishwarbhai Ganeshbhai and subsequently the girl eloped with him. Due to such incident occurred in the village, it was decided to relieve the appellant from the service of 'Simrakha'. It is the case of prosecution that the appellant had doubt in his mind that it was Shantilal Ambalal Patel, the victim in the present case, who was responsible for relieving him from the service.

4.2 That on 26th September 1986, Shantilal had gone to Village Padra along with one Bhailalbhai, brother of Prosecution Witness-Ravjibhai to attend

the court proceeding. Since the case was adjourned to the next date, Shantilal and Bhailalbhai came out from the court and they were together upto the area known as Chakla Chawk of Village Padra. They thereafter separated and Shantilal boarded one Matador from Padra at about 4.30 p.m. for going to Masar. At about 5 O'clock in the evening Shantilal alighted at Masar village at the bus stand where he met Ravjibhai-brother of Bhailalbhai. Both of them thereafter proceeded towards village Masar. On the way one Narsibhai Bapubhai and his wife Gangaben met them and they all were going together towards the village Masar. At about 5.15 to 5.30 p.m., they came near the field of one Chaganbhai Vagri and while they were walking near the hedge of their field, they saw the appellant near the field of Kuber Vasji. He was hiding himself behind the hedge of the field. According to Shantilal, appellant was carrying gun with him at that time. Some time thereafter they also saw original accused No.1 Desaibhai walking with the original accused No.2-appellant herein near the hedge of the field of Kuber Vasji. Shantilal, thereafter, got altered and he warned Ravjibhai that the appellant and Desaibhai were behind the hedge of Kuber's field. According to the prosecution, when

Shantilal tried to look through a gap in the hedge to watch the movements of the appellant, the appellant fired a shot at him from the gun, which hit Shantilal on the left thigh. Ravjibhai, Narsibhai and Gangaben immediately caught Shantilal and thereafter Gangaben shouted for help. In the meantime the appellant and Desaibhai alleged to have run away from the scene of offence. According to the prosecution, Shantilal was thereafter taken to the hospital in an Ambassador car belonging to one Tribhovanbhai, a complaint was thereafter filed with the police of Padra Police Station and on the strength of that complaint, the police registered offence against the original accused Desaibhai and the present appellant for committing offence under section 307 read with section 34 of Indian Penal Code and under Section 25 of the Arms Act.

5. The question paused by learned Counsel for the appellant is that learned trial Judge has not addressed the crucial point in appropriate way that whether the version of the complainant-Shantilal is worthy of relevance. The evidence of bad character of the accused unless legally permissible is

inadmissible, but it is not true when it comes to a complainant. The socio economy background is relevant when it comes to evaluation of evidence mainly the complainant. Social background includes various aspects and the Courts are supposed to examine whether the witness has any inference as to the court proceedings or whether he was found involved in any other offences; if he was an accused then in how many cases he was charged as accused; what was the nature of offence registered against him and if he was held guilty then how much period was remained in jail; if any other persons have developed inimical feeling then the nature and gravity of such inimical feeling, etc., are the fact relevant within the meaning and provisions of the Evidence Act. While weighing the evidence of a complainant, the Court cannot ignore all these aspects merely because he is an injured witness. It is true that injured witness can safely be relied because either victim of the crime or injury itself makes the presence of a particular witness at the spot of the incident. So, while accepting the evidence of injured witness, the Court is supposed to look into various aspects viz.,

multidimensional individuality of a witness who have stepped into a witness box with a view to assist the Court to reach to a correct finding as to the guilty of a person accused. It is submitted that in the present case the injured-Shantilal has emerged as a witness who ought not to have been believed unless his version gets corroboration by leading strong, cogent and independent evidence.

6. Here, it is necessary to mention that Ms.Sheth, learned Counsel for the appellant has not disputed that the injured had sustained injuries in the 'sim' of Village Masargam, that too in the evening of 25/09/1986. Because the blood found from the spot is sufficient to indicate that the incident must have occurred at that very spot or in the nearby area. The place of incident is not a residential area. It is also not in evidence that any of the agriculturist was having field or house in the filed adjacent to the area and they were present. In the same way, it was not disputed neither before the trial Court nor before this Court that injured-Shantilal had sustained gun shot injury. It is

submitted that there is no legal evidence to show that muddamal gun was used in causing the very injury that was found on the body of the injured-Shantilal. It is also disputed that the muddamal gun was holding or possessing by the present appellant and he is the person responsible for firing that gun and caused injury. So, the authorship of the wound is seriously disputed by the appellant. It is submitted that the appellant has been falsely implicated in the crime merely because the injured-Shantilal had inimical feeling with the appellant as well as the original accused No.1 who has been acquitted and therefore to settle the score, the injured-Shantilal implicated both the accused persons. It was possible for injured-Shantilal to carve out a story being an experience person in couple of minutes. The incident allegedly occurred between 5:15 and 5:30 p.m. It is the say of prosecution that initially the injured had been taken to the Police Station and from Police Station he had gone to Hospital for treatment. A person, who had sustained gun shot injury would normally be admitted to the Hospital instead of going to Police Station. This conduct of the complainant is

able to give rise to various doubts. It appears that the complainant has attempted to explain the delay that had caused in giving story for the first available opportunity to the Police otherwise the prosecution could have produced at least the station diary entry. No P.S.O., would have permitted the injured to go out of Police Station without entering the details of the incident in nutshell in the station diary. On perusal of the record, it appears that prosecution has not produced any such document which could have substantiated the say of complainant that he had gone to the Police Station and on the strength of the direction of P.S.O., he went to the Hospital and gave complaint thereafter in the hospital. It is in evidence that accused Nos.1 and 2 neither relatives nor friends, then why these two persons were together? Whether the assault was a conspire assault? If the answer is in affirmative then the prosecution ought to have placed the case of hatching conspiracy by both the accused persons. On the date of incident, one criminal case was posted in the Court of J.M.F.C., Padra where original accused No.1-Desai Girdharbhai Rabari was the complainant and

injured-Shantilal was the accused. It is not in evidence that in the Court of J.M.F.C. Padra, the accused No.2 was in the company of accused No.1. It is also not the case of prosecution that on that date any case of accused No.2 was listed at Padra Court and incidentally he was present at Padra. It is in evidence that there is a criminal case filed by the appellant against injured but hearing of that case must have been fixed to some other date. Otherwise, the complainant could have deposed before the Court and also mentioned in the complaint that the appellant-accused was present at Padra Court and was also aware that the complainant was returning back to his village at about 5:30 p.m. It is also not disputed seriously by Ms.Sheth that accused persons were known to the complainant. As such there is no serious dispute as to the identity of the accused persons, but the presence at the spot of the incident on 25/09/1986 is disputed. The say of complainant is that both the accused were inimical to him (complainant), and therefore he had been charged in one criminal case pending before the Padra Court but, on the other hand the say of the accused is that as

the complainant was inimical to him, the accused-appellant was falsely implicated. This Court as well as the Apex Court has observed in more than one cases that normally the tendency of the complainant is to implicate more number of persons but the genuine complainant would not let leave the original assailant. But, in the present case, the question paused before the Court is that whether the complainant like the present one would implicate two innocent persons taking advantage of the situation that as he could not identify the actual assailants being unknown persons under some inference or conjectures he might have thought that assault made on him is at the instance of either one of the accused persons or at the instance of both and therefore he may have named both these persons while giving complaint that two unknown persons had assaulted him and one of them was holding fire arm. Not disclosing the story immediately on first available opportunity throws shadow of doubt that had the complainant been gone to Padra Police Station before going to Padra Hospital.

7. It is in evidence that there were about 28 criminal cases against the injured-Shantilal. So, he could have given the name of any inimical persons out of that 28 persons alleging that one of them was holding fire arm and that very person had inflicted the gun shot injury. The investigation perhaps might have proceeded on that direction. There is nothing on record to show that ultimately what had happened after incident because only son of the appellant-accused was involved. It is alleged that appellant had lost his job / employment from Masar Gram Panchayat for the wrong committed by his son. No special motive is attributed to the present appellant except the say of the complainant that the appellant was inimical to him because the appellant was suspecting that complainant was the person responsible for getting his job removed, while the appellant was serving as “Sim Rakha”. The appellant-accused was terminated from the job in the month of August, 1984. It is not the say of the complainant that because of the criminal complaint or any other proceeding between him and the appellant, the appellant was inimical to him. It appears that

complainant has attempted to put curtain on some another incident which had compelled the appellant to file a criminal case against the injured-Shantilal in the court of learned J.M.F.C., Padra. It is not in evidence that the case instituted on the complaint made by the appellant is a police case or a private complaint. It is also not in evidence that the case between the appellant and the injured- Shantilal is old by how many years. So it is very likely that the incident leading to the criminal case between the appellant and the injured may be resting on event occurred after August, 1984 or prior to the incident. The learned trial Judge ought to have thought that can the appellant be made attempt to inflict the gun shot injury after about two years. A plain reading of the charge, complaint and the nature of answers given by the complainant, on the contrary emerges that the motive pleaded in the present case by prosecution is too remote. Because more fresh reasons perhaps were available to assault-Shantilal and one of the persons might have arranged for the assault. Only because Shantilal was not able to identify the real assailants, he took the advantage

to settle the score qua two important complainants of two different criminal cases which was pending against him in the Court of J.M.F.C., Padra. When the injured witness has admitted that he was detained under the PASA twice and P.W.No.4 has admitted that many cases have been filed against the injured, then such witness can be branded as court bird and able to arrange a story in a very short span.

8. Even, Prosecution Witness No.4-Ravjibhai Haribhai Patel has admitted that injured-Shantilal is accused in number of cases and these cases are pending in the Court of J.M.F.C., Padra. The original accused No.1 had filed a case against the complainant-Shantilal and younger brother of witness-Ravjibhai is one of the co-accused in that case. It is in evidence that on 26/09/1986 brother of Ravjibhai-Nanabhai Bhailalbhai had gone to village Padra to attend the Court proceeding with Shantilal. On that day the original accused No.1 of the present case who has been acquitted, was also present in the Court of Padra and the Court had adjourned the case on the next date. This is an indicative of the fact

that looking to the determination of the mind of the Court to proceed with the case on merits, it is very likely that, injured-Shantilal may have implicated the accused No.1 vice unidentified accused who might have given the blow which was found on the body of the injured during the course of treatment. This injury is the injury other than the fire arm injury.

9. Prosecution Witness No.2-Dr.Mathews Kakenath Ike, who has been examined at Exh.9 has described the injuries in his deposition as contusion on the left thigh ad-measuring 1.5 C.M. X 1.75 C.M. and this injury was at upper middle 1/3 of thigh. This injury is not possibly caused simply by falling down on the earth. The earth is covered with grass and waste leaves of the tree. If the learned Judge has accepted that accused No.1 had not played any role in causing fire arm injury nor he has been linked with this contusion that was found on the body of injured-Shantilal then, it is inferable that the learned trial Judge has practically accepted that case against the accused No.1 was without any basis. Because while narrating the details of the incident

normally the victim would name the persons firstly who has inflicted a grievous hurt or an injury which can be comparatively grave. The complainant has named accused No.1 as main accused. It is true that error in selecting the chronology of the accused would not itself make the prosecution case doubtful but when the Court is scanning the version of the injured then the deposition should be read as a whole and it should be viewed from all different possible angles. Considering the number of injuries that were found on the body of injured-Shantilal that could have been caused by pellets which were ten in number but on the other hand the number of holes found on the clothe are comparatively more. So, it is possible to infer that some of the pellets must have been passed through that loose shirt popularly known as “Zabhbha”. No fracture was caused because of the injury. The description of each wound is given by the doctor in the certificate after giving a look on these ten punctured wounds. It appears that these were practically superficial. Of course, the pellets may have entered into the body but it appears that no formal x-ray was produced by prosecution. There is

nothing on record to show that accused was operated and any pellet was taken out from the body. There is confusion in the evidence as to the collection of pellets from the spot of incident because the Panchnama says that no pellets had been found. However, one witness has stated that during the course of Panchnama some pellets were collected from the spot. The documentary evidence reveals that no pellets were sent to ballistic expert for examination or analysis. This totality is sufficient to reach to a conclusion that the person who had used the fire arm with an intention to cause injury to Shantilal, must have fired from a reasonable good distance. If P.W.No.4-Ravji was at a distance of about 4' then possibly he might have also sustained injury by the pellet moving in the same direction. He might have or might have not sustained injury but when it is in evidence that the injury was caused on the left thigh of body of the injured-Shantilal then the person who had fired the arm must be on the left side of the injured. Now, the say of the complainant in the complaint is that assailant had fired from gun after coming out from the cluster of bushes. In such a

situation, the injury would be on the front portion of the body or the back portion of the body but not on the side portion of the body. There is modulation by injured-Shantilal if the complaint is read in the background of his deposition. It is observed by the Apex Court that a witness who attempts to modulate the theory or it can be made more convenient to the story narrated by other witnesses or to the papers then the version of such witnesses should be viewed with doubt. It appears that because of the cluster of bushes it was not possible to notice the presence of anybody. It also appears that therefore only both the witnesses have stated that as they were suspecting some movement in the field of Kuberbhai, they bent down and tried to ascertain that who were those persons moving and at that time both the witnesses had seen the accused persons. It is their say that when they were looking, at very point of time the gun was fired. If the other side was visible then there was no need for any of them to bend down and to look towards the people who were on the other side of the cluster of bushes. It is in evidence that height of the cluster of bushes was

about more than six to seven feet. They have stated that there was a gap in between of cluster of bushes and they had also seen through that gap and both the accused persons were there and after firing from the gun both of them had run away. The conduct of both these witnesses of moving on the spot and narrating the existence of one gap between the cluster of bushes impliedly proves the thickness and height of cluster of bushes. So, their version ought not to have been accepted as gospel truth merely because they have stated that both of them had seen the accused persons. The complainant-Shantilal had noticed the movement of present appellant much prior to Ravji and thereafter Ravji had confirmed the presence of both these accused persons after bending down with the complainant-Shantilal immediately and prior to fire from the muddamal gun.

10. The version of Prosecution Witness No.4, Ravji has been assailed. Undisputedly, he is the brother of the accused who was to face trial on the next date with the complainant-Shantilal at Padra Court, where original accused No.1 of the present case is the complainant. He has not stated anything

that in giving support to the complainant or in taking the complainant to Padra Police Station or Padra Hospital, his clothes had been stained with the blood. Of course, there is no serious dispute as to the existence of his agricultural land near bus-stand and the evening time is also a time for a farmer to return from his field to his village residence. But in that direction number of farmers may have their agricultural field and two persons have been named. One Ganga was also coming in the same direction i.e., towards the village and she was carrying cattle fodder and one Narsinhbhai was also coming. They were not at a good distance and it is the case of prosecution that both these persons were there and had seen the incident then at least one of these two persons ought to have been examined by prosecution. It is true that no duplication of evidence is required to be made and prosecutor can select one witness to prove the crime. Ultimately, Ravji was examined to corroborate the say of injured eye-witness. Prosecution Witness No.4-Ravji is a person who would invite serious criticism from the defence side being a brother who is inimical to accused No.1.

It is also the say of Ravji that he or his brother were not at least cordial with the appellant and Ravji was interested in the result of the proceeding that was being pending before the Court of learned J.M.F.C., Padra. So, he being a close relative-real elder brother of one of the accused-Bhailal, can be said to be a partition witness. The learned Judge ought to have evaluated the evidence of Ravji as a chance witness. According to me, Ravji was not only the chance witness but also a partition witness. It appears that as the original accused No.1 of the present case-complainant of criminal case that was pending before the J.M.F.C. Padra Court which was registered against Bhailalbhai-younger brother of Prosecution Witness No.4-Ravji, for the charge of offence punishable under Section 307 of I.P.C., P.W. No.4-Ravji had agreed to toe the line of injured witness-Shantilal. It is very likely that Ravji may have substituted vise Bhailal. Clear probability is emerged that after the incident the complainant of the present case and Bhailal-brother of Ravji (P.W. No.4) may have decided to implicate both these accused persons with the help of Prosecution Witness

No.4, unidentifiable assailants to whom they could not identify.

11. To rule out the defence probability of false implication in serious offence, the prosecution could have examined either Ganga or Narsinhbhai as a Prosecution Witness. According to Ms.Sheth, both these persons were comparatively more independent than Ravji (P.W. No.4). When it is in evidence that Gangaben had actively participated in the incident; she had off loaded the burden that she was carrying and had rushed towards the Village and shouting for help and Narsinhbhai is one of the person who had helped the injured in reaching to a motorcar then, one of these witnesses could have stated before the Court about the details of the incident. It is very likely that these witnesses may have seen the assailants or at least the injured or Ravji may have stated about the manner and reason in which the gun was fired. It was also possible to examine one of them as prosecution witness over and above the evidence after examining the Ravji when the defence Lawyer had impeached the status and intention of

Ravji. It is rightly argued that when evidence of such witness viewed as weak piece of evidence, it is settled that it would not be safe to rely on a weak piece of evidence and such evidence cannot be used legally as corroborative piece of evidence. It is the duty of prosecution to bring home the charge beyond reasonable doubt and it would be risky for the Court to accept the evidence of Ravji as reliable piece of evidence especially by saying that evidence of this witness provides sufficient corroboration to the evidence of Prosecution Witness No.1-Shantilal Amabalal.

12. The present appellant-original accused No.2 has not been charged for the offence punishable under the Arms Act. The learned trial Judge has held that the discovery Panchnama is not a reliable piece of evidence. When the learned trial Judge has not accepted that the muddamal weapon gun was discovered or has been recovered at the instance of the accused, then it would not be safe for the Court to link the accused with the gun. In the same way, it is rightly argued by Ms.Sheth that there is no evidence of

expert on record that before how many hours the muddamal gun was used. The opinion of the ballistic expert has been received while recording of evidence of Investigating Officer. The prosecution on the contrary ought to have examined the expert in the Court because both the barrels were found with presence of carbon, etc. and some papers were also found from the muddamal gun. The muddamal gun is double barrel gun. Non-examination of ballistic expert in such or similar cases creates serious prejudice and the defence side does not get reasonable opportunity to put number of questions which may ultimately throw the shadow of doubt on the story unfolded by prosecution. It appears that in the present case the Investigating Agency has not cared to recover the empty cartridges or cap of cartridges, otherwise the expert could have shown this cartridge vis-a-vis the size of injury / entry wound that was seen by the Doctor on the thigh of complainant. One more question is also not satisfactorily answered by the prosecution is that, if the accused No.1 was present at Padra Court and the say of the complainant is that he had straightway returned from Padra Court

to his village then how the acquitted accused No.1 of the present case should reach much prior to the complainant and was able to arrange for the company of the present appellant anticipating the return of the complainant at relevant point of time and place. It is not the case that accused No.2 was hired by accused No.1. The evidence shows that injured-Shantilal has number of enemies and therefore only he was facing about 28 criminal cases. The acquitted original accused No.1 was the victim of the criminal wrong committed by the injured Shantilal and the accused No.1 instead of settling the score outside the Court had decided to become the complainant. This conduct is a conduct of law abiding citizen and when the case was to proceed actually, he would not become party in making assault by gun that too through third person. It is true that present appellant was staying in the outskirts and has not vacated the premises allotted to him by the Village Panchayat and none of the witnesses have stated that present appellant is a headstrong man and though Panchayat had served him with a notice to vacate the premises, he was not vacating the same.

13. It is important to note that Police had registered the offence punishable under Section 25 (1C) of the Arms Act against both the accused persons and they were charge-sheeted accordingly. The case was committed to the Court of Sessions under the provisions of Section 209 of the Code of Criminal Procedure and thereafter tried for the offence punishable under Section 307 of the Indian Penal Code read with Section 34 of the Indian Penal code and also under Section 25 (1C) of the Arms Act. However, no formal charge under the Arms Act was framed so it was not possible for the trial Court to evaluate the evidence of the prosecution from that angle and this Court has also evaluated the impugned judgment and order in this background.

14. There is enough force in the argument of the learned Counsel appearing for the appellant that when there is no direct allegation nor there is any evidence to show that accused No.1 and 2 were friends or otherwise related to each other professionally, how can they assail the intention to kill the injured-Shantilal. Merely, because the present

witness is an injured witness, story unfolded by him should not be believed as gospel truth. Evidence of each witness requires to be tested on the touch stone of truth is the accepted principle of law. Trial is nothing but a fact finding mission. In the present case, it is difficult for this Court to accept the say of learned A.P.P., Ms.Pandit that the conviction is based on sound reasons. On the contrary, the learned trial Judge has inferred number of things while accepting the say of injured-Shantilal as reliable piece of evidence. Same is the situation qua oral evidence of Ravji. The corroboration from medical evidence does not take the prosecution any further because the nature of injury has not been seriously disputed from the beginning by the defence side. The trial Judge was supposed to decide the point whether the prosecution has proved beyond doubt that both the accused had common intention to kill the injured-Shantilal and therefore both of them had hidden themselves behind the cluster of bushes and in furtherance of that intention, the accused No.2 fired from the muddamal gun and the attempt to kill Shantilal was made but fortunate of Shantilal had

sustained injuries on the lower part of his body otherwise he would have lost his life. So, the authorship of the injury was to be determined by the learned trial Court and the evidence on the contrary shows that it was not possible to identify the person, if person is behind the cluster of bushes and causes injury with the help of the fire arm. It is rightly assumed that there were no good reasons to acquit the original accused No.1, if the story of the prosecution is found to have been proved and in the same way there are no good reasons in the impugned judgment and order to link the original accused No.2 with the crime.

15. The Court is of the view that the evidence led by prosecution is not free from the shadow of doubt. Evidence produced on record cannot be said to be cogent or convincing evidence of nature. There are number of improvements which can be said to be material improvements in the deposition of witnesses and reference to the basic story placed in the F.I.R. There were ample scope for the complainant to implicate any of two out of number of enemies and in

such a situation the trial Judge ought to have given the benefit of doubt to both the accused persons. The Court is also of the view that the case of the present appellant was separable considering the totality from accused No.1 and therefore the Court is inclined to allow the present appeal, expressing its disagreement with the reasons assigned by the learned trial Judge for recording the conviction of the present appellant-original accused No.2.

16. In the result the present Criminal Appeal is allowed. The judgment and order of conviction and sentence dated 24th January, 1992, rendered by the learned Additional Sessions Judge, Vadodara in Sessions Case No.106 of 1987 is hereby quashed and set aside. The appellant is acquitted of the charge of offence punishable under Section 307 of the Indian Penal Code. Fine, if paid by the appellant, is ordered to be refunded to him on proper identification.

17. Bail Bond executed by the appellant-accused shall stand discharged. Order and Direction accordingly.

(C.K.BUCH, J.)

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